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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 GARY F. HERRIN,)
7 Plaintiff,) No. CV-10-54-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on February 11, 2011 (Ct. Rec.
15 13, 15). Attorney Maureen J. Rosette represents Plaintiff; Special
16 Assistant United States Attorney Leisa A. Wolf represents the
17 Commissioner of Social Security (Commissioner). Plaintiff replied
18 on January 31, 2011 (Ct. Rec. 17). The parties have consented to
19 proceed before a magistrate judge (Ct. Rec. 8). After reviewing
20 the administrative record and the briefs filed by the parties, the
21 court **grants** Defendant's Motion for Summary Judgment (Ct. Rec. 15)
22 and **denies** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13).

23 **JURISDICTION**

24 Plaintiff concurrently filed applications for disability
25 insurance benefits (DIB) and supplemental security income (SSI) on
26 December 12, 2006, alleging disability as of December 2, 2005 (Tr.
27 67, 105-107, 108-111). The applications were denied initially and
28 on reconsideration (Tr. 80-83, 85-88).

1 At a hearing before Administrative Law Judge (ALJ) Robert
2 Chester on July 16, 2008, plaintiff, represented by counsel, and a
3 vocational expert testified (Tr. 24-57). On August 20, 2008, the
4 ALJ issued a partially favorable decision finding plaintiff
5 disabled for the closed period of December 2, 2005, through
6 September 25, 2007, but not thereafter (Tr. 74-75,78-79). The
7 Appeals Council denied Mr. Herrin's request for review on January
8 15, 2010 (Tr. 1-4). Therefore, the ALJ's decision became the final
9 decision of the Commissioner, which is appealable to the district
10 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action
11 for judicial review pursuant to 42 U.S.C. § 405(g) on March 5,
12 2010 (Ct. Rec. 1,4).

13 STATEMENT OF FACTS

14 The facts have been presented in the administrative hearing
15 transcript, the ALJ's decision, the briefs of both plaintiff and
16 the Commissioner, and are briefly summarized here.

17 Plaintiff was 46 years old at onset and 49 at the hearing
18 (Tr. 28, 73). He has a high school education and earned a
19 certificate in construction management after completing a two year
20 course at California Polytechnic University (Tr. 31, 127). Mr.
21 Herrin has worked as a construction project manager, outside
22 delivery driver, parts salesperson, and recreation supervisor (Tr.
23 32-37, 49-50, 123). He is unmarried and lives with his mother (Tr.
24 30).

25 Plaintiff cannot work because his right foot is "always
26 swelling up and hurting." He quit physical therapy because the
27 physical therapist was not showing up for the appointments (Tr.
28 39). Mr. Herrin testified he does not really have a good reason

1 for failing to follow up with treatment provider Eugene G.
2 Pontecorvo, M.D., after February 2007 (Tr. 41-42).

3 Plaintiff testified he did not take any prescribed
4 medication; wears a hiking boot style orthopedic shoe in the
5 winter and takes ibuprofen occasionally, both of which help
6 alleviate foot pain (Tr. 25, 29-30,41-42), and walks with a limp
7 (Tr. 45). Activities include laundry, cooking, driving, shopping,
8 yard work, visiting neighbors, and fishing two or three times a
9 week (Tr. 30-31,43,46,131-133). Mr. Herrin can sit for 30 minutes,
10 walk for fifteen minutes, and stand for fifteen to twenty minutes
11 (Tr. 44-45). He frequently elevates his foot throughout the day,
12 from 30 to 90 minutes at a time, to relieve swelling (Tr. 45).

13 SEQUENTIAL EVALUATION PROCESS

14 The Social Security Act (the Act) defines disability
15 as the "inability to engage in any substantial gainful activity by
16 reason of any medically determinable physical or mental impairment
17 which can be expected to result in death or which has lasted or
18 can be expected to last for a continuous period of not less than
19 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
20 also provides that a Plaintiff shall be determined to be under a
21 disability only if any impairments are of such severity that a
22 plaintiff is not only unable to do previous work but cannot,
23 considering plaintiff's age, education and work experiences,
24 engage in any other substantial gainful work which exists in the
25 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
26 Thus, the definition of disability consists of both medical and
27 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
28 (9th Cir. 2001).

1 The Commissioner has established a five-step sequential
2 evaluation process for determining whether a person is disabled.
3 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
4 is engaged in substantial gainful activities. If so, benefits are
5 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
6 the decision maker proceeds to step two, which determines whether
7 plaintiff has a medically severe impairment or combination of
8 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

9 If plaintiff does not have a severe impairment or combination
10 of impairments, the disability claim is denied. If the impairment
11 is severe, the evaluation proceeds to the third step, which
12 compares plaintiff's impairment with a number of listed
13 impairments acknowledged by the Commissioner to be so severe as to
14 preclude substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
16 App. 1. If the impairment meets or equals one of the listed
17 impairments, plaintiff is conclusively presumed to be disabled.
18 If the impairment is not one conclusively presumed to be
19 disabling, the evaluation proceeds to the fourth step, which
20 determines whether the impairment prevents plaintiff from
21 performing work which was performed in the past. If a plaintiff is
22 able to perform previous work, that Plaintiff is deemed not
23 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
24 this step, plaintiff's residual functional capacity (RFC)
25 assessment is considered. If plaintiff cannot perform this work,
26 the fifth and final step in the process determines whether
27 plaintiff is able to perform other work in the national economy in
28 view of plaintiff's residual functional capacity, age, education

1 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
2 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

3 The initial burden of proof rests upon plaintiff to establish
4 a *prima facie* case of entitlement to disability benefits.

5 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
6 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
7 met once plaintiff establishes that a physical or mental
8 impairment prevents the performance of previous work. The burden
9 then shifts, at step five, to the Commissioner to show that (1)
10 plaintiff can perform other substantial gainful activity and (2) a
11 "significant number of jobs exist in the national economy" which
12 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
13 Cir. 1984).

14 STANDARD OF REVIEW

15 Congress has provided a limited scope of judicial review of a
16 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
17 the Commissioner's decision, made through an ALJ, when the
18 determination is not based on legal error and is supported by
19 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
20 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
21 "The [Commissioner's] determination that a plaintiff is not
22 disabled will be upheld if the findings of fact are supported by
23 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
24 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
25 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
26 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
27 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
28 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d

1 573, 576 (9th Cir. 1988). Substantial evidence "means such
2 evidence as a reasonable mind might accept as adequate to support
3 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
4 (citations omitted). "[S]uch inferences and conclusions as the
5 [Commissioner] may reasonably draw from the evidence" will also be
6 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
7 review, the Court considers the record as a whole, not just the
8 evidence supporting the decision of the Commissioner. *Weetman v.*
9 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
10 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

11 It is the role of the trier of fact, not this Court, to
12 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
13 evidence supports more than one rational interpretation, the Court
14 may not substitute its judgment for that of the Commissioner.
15 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
16 (9th Cir. 1984). Nevertheless, a decision supported by substantial
17 evidence will still be set aside if the proper legal standards
18 were not applied in weighing the evidence and making the decision.
19 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
20 433 (9th Cir. 1987). Thus, if there is substantial evidence to
21 support the administrative findings, or if there is conflicting
22 evidence that will support a finding of either disability or
23 nondisability, the finding of the Commissioner is conclusive.
24 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

25 ALJ'S FINDINGS

26 At the outset, the ALJ found plaintiff met DIB insurance
27 requirements through December 31, 2007 (Tr. 67,71). At step one,
28 the ALJ found plaintiff did not engage in substantial gainful

1 activity after onset (Tr. 71). At steps two and three, he found
2 Mr. Herrin suffers from a fractured heel¹, an impairment that is
3 severe but does not alone meet or medically equal a Listed
4 impairment (Tr. 71). At steps four and five, he found plaintiff
5 was unable to perform past work, or any work, from December 2,
6 2005 through September 25, 2007. He found plaintiff disabled for
7 this closed period.

8 The ALJ found plaintiff less than completely credible (Tr.
9 76). He also found plaintiff's medical condition improved. At step
10 four, relying on the VE, the ALJ found as of September 26, 2007,
11 plaintiff's RFC for a range of light work enabled him to perform
12 past relevant work. These jobs included construction project
13 manager, outside delivery driver, and parts salesperson (Tr.
14 52,78). Accordingly, the ALJ found that as of September 26, 2007,
15 plaintiff was not disabled as defined by the Social Security Act
16 (Tr. 79).

17 ISSUES

18 Plaintiff alleges the Commissioner erred when he found Mr.
19 Herrin's medical condition had improved by September 26, 2007. Mr.
20 Herrin alleges his medical condition worsened. Second, plaintiff
21 alleges the ALJ's credibility assessment is flawed. Last, he
22 asserts the court should reverse the ALJ's decision based on new
23 evidence submitted to the Appeals Council, but not to the ALJ (Ct.
24

25 ¹Plaintiff fell from a ladder in December 2005 and fractured
26 his right heel. Tests showed he suffered a "complex comminuted
27 compression type calcaneal fracture" (Tr. 72, 173-174, 176). On
28 December 21, 2005, Brian Padrta, M.D., performed an open
reduction, internal fixation surgery to repair the fracture (Tr.
180).

1 14 at 8, 10-11). According to the Commissioner, the ALJ
2 appropriately weighed the evidence and assessed credibility, and
3 the medical reports admitted by the Appeals Council do not
4 necessitate remand. The Commissioner asks the Court to affirm (Ct.
5 Rec. 16 at 5-11).

6 DISCUSSION

7 A. Weighing medical evidence

8 In social security proceedings, the claimant must prove the
9 existence of a physical or mental impairment by providing medical
10 evidence consisting of signs, symptoms, and laboratory findings;
11 the claimant's own statement of symptoms alone will not suffice.
12 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
13 on the basis of a medically determinable impairment which can be
14 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
15 medical evidence of an underlying impairment has been shown,
16 medical findings are not required to support the alleged severity
17 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cr.
18 1991).

19 A treating physician's opinion is given special weight
20 because of familiarity with the claimant and the claimant's
21 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
22 1989). However, the treating physician's opinion is not
23 "necessarily conclusive as to either a physical condition or the
24 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
25 751 (9th Cir. 1989)(citations omitted). More weight is given to a
26 treating physician than an examining physician. *Lester v. Chater*,
27 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
28 given to the opinions of treating and examining physicians than to

1 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
2 (9th Cir. 2004). If the treating or examining physician's opinions
3 are not contradicted, they can be rejected only with clear and
4 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
5 ALJ may reject an opinion if he states specific, legitimate
6 reasons that are supported by substantial evidence. See *Flaten v.*
7 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
8 1995).

9 In addition to the testimony of a nonexamining medical
10 advisor, the ALJ must have other evidence to support a decision to
11 reject the opinion of a treating physician, such as laboratory
12 test results, contrary reports from examining physicians, and
13 testimony from the claimant that was inconsistent with the
14 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
15 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
16 Cir. 1995).

17 Plaintiff contends that the ALJ failed to properly credit the
18 September 25, 2007, opinion of examining doctor Edmund W. Gray,
19 M.D. (Ct. Rec. 14 at 10-11).

20 As noted, plaintiff underwent foot surgery on December 21,
21 2005 (Tr. 180). On January 4, 2006, treating surgeon Dr. Padrta
22 referred Mr. Herrin for physical therapy (Tr. 191). By February 8,
23 2006, plaintiff was able to wear a regular shoe (Tr. 192). Less
24 than three months after surgery, on March 8, 2006, Dr. Padrta
25 opined plaintiff was severely limited and unable to perform six
26 basic work-related activities (Tr. 187), but should be reevaluated
27 for returning to work on March 20, 2006 (Tr. 188). On March 20,
28 2006, he opined it "is not uncommon for this to take up to a year

1 or so to get back to as much function as can be expected." Dr.
2 Padrta did not foresee plaintiff returning to heavy labor jobs
3 with this injury, and "[h]e [plaintiff] will try to make
4 arrangements regarding that" (Tr. 193).

5 On December 19, 2006, treating physician Pontecorvo observed
6 some atrophy. He prescribed shoe modification (Tr. 196). In
7 January 2007, he diagnosed subtalar arthritis and advised
8 plaintiff the condition is usually treated with subtalar fusion
9 when it becomes "sufficiently symptomatic" (Tr. 195). On February
10 21, 2007, Dr. Pontecorvo observes it has been more than a year
11 since surgery (Tr. 194). He suspects the hardware may be causing
12 pain that could be alleviated with removal. As a first measure,
13 however, the doctor again prescribed shoe modification. He notes
14 if this does not work, plaintiff should then consider having the
15 hardware removed or undergoing subtalar joint fusion (Tr. 194).

16 On September 25, 2007, Dr. Gray re-evaluated plaintiff. He
17 notes plaintiff's only present skill is "in the heavy labor
18 market" (Tr. 215). When Dr. Gray last saw plaintiff in 2006, he
19 recommended Mr. Herrin work toward vocational rehabilitation. In
20 2007, Dr. Gray points out this has not been done.

21 Dr. Gray notes plaintiff is not using cushioning as
22 recommended by Dr. Pontecorvo, and he has failed to follow up with
23 him [Dr. Pontecorvo]. On exam, the doctor states plaintiff's range
24 of motion of the ankle and back are within normal limits; so is
25 the heel and toe walking test. He observes there is no muscle
26 atrophy (Tr. 215). After opining plaintiff should cooperate with
27 Dr. Pontecorvo's recommendations, Dr. Gray states

28 Since injuries of this nature have a tendency to
slowly worsen with the aging process, it may be close

1 to the last chance that this gentleman has of getting
2 back to work vs. a permanent impairment that would make
it difficult for him to get back to work even though
technically he might be able to do that."

3 (Tr. 216).

4 To further aid in weighing the conflicting medical evidence,
5 the ALJ evaluated plaintiff's credibility and found him less than
6 fully credible (Tr. 76-77). Credibility determinations bear on
7 evaluations of medical evidence when an ALJ is presented with
8 conflicting medical opinions or inconsistency between a claimant's
9 subjective complaints and diagnosed condition. See *Webb v.*
10 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

11 It is the province of the ALJ to make credibility
12 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
13 1995). However, the ALJ's findings must be supported by specific
14 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
15 1990). Once the claimant produces medical evidence of an
16 underlying medical impairment, the ALJ may not discredit testimony
17 as to the severity of an impairment because it is unsupported by
18 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
19 1998). Absent affirmative evidence of malingering, the ALJ's
20 reasons for rejecting the claimant's testimony must be "clear and
21 convincing." *Lester v. Chater*, 81 F.3d at 834. "General findings
22 are insufficient: rather the ALJ must identify what testimony not
23 credible and what evidence undermines the claimant's complaints."
24 *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

25 The ALJ relied on several factors when he assessed
26 credibility: inconsistent statements, failure to follow
27 recommended courses of treatment, and activities inconsistent with
28 the degree of impairment alleged (Tr. 75-77).

1 *Inconsistent statements.* Plaintiff complained he lost muscle
2 tone. The ALJ accurately observes Dr. Gray's 2007 report states
3 there are *no signs* of atrophy (Tr. 76, citing Ex. 7F/5). Plaintiff
4 testified he stopped going to physical therapy because the
5 therapist failed to show up for two appointments. Physical therapy
6 records show it was Mr. Herrin who missed appointments. In
7 addition, he failed to contact the therapist from March to April
8 2006. When he did attend physical therapy, plaintiff admitted he
9 was not complying with the home exercise program (Tr. 76, 227-
10 228).

11 *Unexplained failure to follow medical advice.* In February
12 2007, Dr. Pontecorvo prescribed orthopedic shoes and explained if
13 this did not alleviate plaintiff's pain, the hardware in his foot
14 could be surgically removed (Tr. 76, Ex. 5F/1). Seven months
15 later, in September 2007, Dr. Gray notes plaintiff used no cushion
16 when walking, had not reported back to Dr. Pontecorvo, and "the
17 testing to have special shoes [made] had not been done" (Tr. 76,
18 Ex. 7F/5). The ALJ points out plaintiff testified he had no good
19 reason for failing to follow up with Dr. Pontecorvo.

20 *Daily activities.* Plaintiff's activities include mowing the
21 lawn, grocery shopping, laundry, cooking, fishing several times a
22 week, walking, and driving (Tr. 77, Ex. 3E).

23 The ALJ's reasons for finding plaintiff less than fully
24 credible are clear, convincing, and fully supported by the record.
25 *See Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
26 2002)(proper factors include inconsistencies in plaintiff's
27 statements, inconsistencies between statements and conduct, and
28 extent of daily activities). Noncompliance with medical care or

1 unexplained or inadequately explained reasons for failing to seek
2 medical treatment also cast doubt on a claimant's subjective
3 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.
4 2d 597, 603 (9th Cir. 1989).

5 The ALJ rejected some of Dr. Gray's September 2007 opinions
6 because objective evidence in the same report shows considerable
7 improvement in plaintiff's condition since November of 2006, the
8 time of Dr. Gray's initial evaluation. Second, citing plaintiff's
9 age and lack of vocational rehabilitation, Dr. Gray did not lower
10 Mr. Herrin's severity rating to moderately impaired (Tr. 78,
11 referring to Ex. 7F/1-6). The ALJ observes Dr. Gray prepared his
12 report for the Department of Social and Health Services, an agency
13 governed by different rules and guidelines than the SSA. *Id.*

14 The ALJ's reasons for rejecting some of the examining
15 doctor's contradicted opinions are specific, legitimate and
16 supported by substantial evidence. *See Lester*, 81 F.3d at 821. The
17 ALJ is correct that plaintiff's lack of vocational rehabilitation
18 is immaterial to the RFC assessment (Tr. 78). He is also correct
19 Dr. Gray's objective examination results do not support his
20 assessment that plaintiff suffers "significant interference with
21 the ability to perform work activities" (Tr. 78, 211-216). An ALJ
22 is not required to credit an opinion that is conclusory, brief,
23 and unsupported by clinical findings. *Matney v. Sullivan*, 981 F.2d
24 1016, 1019 99th Cir. 1992).

25 The ALJ is responsible for reviewing the evidence and
26 resolving conflicts or ambiguities in testimony. *Magallanes v.*
27 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
28 trier of fact, not this court, to resolve conflicts in evidence.

1 *Richardson*, 402 U.S. at 400. The court has a limited role in
2 determining whether the ALJ's decision is supported by substantial
3 evidence and may not substitute its own judgment for that of the
4 ALJ, even if it might justifiably have reached a different result
5 upon de novo review. 42 U.S.C. § 405 (g).

6 The ALJ's assessment of the evidence, including credibility,
7 is both legally and factually supported.

8 **B. Appeals Council evidence**

9 The ALJ filed his decision on August 20, 2008 (Tr. 79).
10 Plaintiff alleges the decision should be reversed based on
11 evidence received by the Appeals Council after the ALJ's decision
12 (Ct. Rec. 14 at 11-12). The evidence includes medical reports
13 dated September 9 and 25, 2008; October 29, 2008; November 11, 17
14 and 25, 2008, and December 2, 2008 (Tr. 8-18, 20-21).

15 Plaintiff's brief states:

16 "The regulations regarding review by the Appeals Council
17 provide: If new and material evidence is submitted, the Appeals
18 Council shall consider the additional evidence *only where it*
19 *relates to the period on or before the date of the [ALJ] hearing*
20 *decision*. The Appeals Council shall evaluate the entire record,
21 including the new and material evidence submitted *if it relates to*
22 *the period on or before the date of the [ALJ's] hearing decision*.
23 20 CFR §§ 404.970(b), 416.1470(b)."

24 (Ct. Rec. 14 at 11)(italics supplied).

25 The evidence submitted after the hearing does not relate to
26 the period on or before the ALJ's decision.

27 This court has jurisdiction to remand matters on appeal for
28 consideration of newly discovered evidence. *Goerg v. Schweiker*,

1 643 F.2d 582, 584 (9th Cir. 1981); 42 U.S.C. § 405(g). Section
2 405(g) expressly provides for remand where new evidence is
3 "material" and there is "good cause" for the failure to
4 incorporate the evidence in a prior proceeding. *Burton v. Heckler*,
5 724 F.2d 1415, 1417 (9th Cir. 1984). To be material, the new
6 evidence must bear directly and substantially on the matter in
7 issue. *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985). Also,
8 there must be a reasonable possibility that the new evidence would
9 have changed the outcome if it had been before the Secretary. *Booz*
10 *v. Secretary of Health and Human Services*, 734 F.2d 1378, 1380-
11 1381 (9th Cir. 1984).

12 First, the new evidence is not material. The records
13 submitted are immaterial because they do not address plaintiff's
14 medical status during the relevant period at issue in this action.
15 Second, plaintiff offers no reason why information from these
16 providers was not solicited earlier. This is not "good cause."
17 *See, e.g., Allen v. Secretary of Health and Human Services*, 726
18 F.2d 1470, 1473 (9th Cir. 1984)(seeking out a new success with the
19 agency does not establish "good cause"). Since plaintiff fails to
20 meet the materiality and good cause requirements, the court is not
21 able to consider the newly submitted evidence. If plaintiff's
22 conditioned has worsened, he may file a new application.

23 The ALJ's assessment of the medical evidence and plaintiff's
24 credibility are supported by the record and free of legal error.
25 The new evidence submitted to the Appeals Council after the
26 hearing is immaterial.

27 CONCLUSION

28 Having reviewed the record and the ALJ's conclusions, this

1 court finds that the ALJ's decision is free of legal error and
2 supported by substantial evidence..

3 **IT IS ORDERED:**

4 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
5 **GRANTED.**

6 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
7 **DENIED.**

8 The District Court Executive is directed to file this Order,
9 provide copies to counsel for Plaintiff and Defendant, enter
10 judgment in favor of Defendant, and **CLOSE** this file.

11 DATED this 11th day of February, 2011.

12 s/ James P. Hutton
13 JAMES P. HUTTON
14 UNITED STATES MAGISTRATE JUDGE
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